

STATE OF MICHIGAN  
COURT OF APPEALS

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*In re* COPE/HECT, Minors.

UNPUBLISHED  
March 15, 2016

No. 328536  
Monroe Circuit Court  
Family Division  
LC No. 14-023230-NA

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*In re* COPE/HECT, Minors.

No. 328537  
Monroe Circuit Court  
Family Division  
LC No. 14-023230-NA

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Before: RONAYNE KRAUSE, P.J., and JANSEN and STEPHENS, JJ.

PER CURIAM.

Respondent T. Cope appeals as of right in Docket No. 328536, and respondent D. Hect, Jr., appeals as of right in Docket No. 328537, each challenging the trial court's order terminating parental rights. The court terminated T. Cope's parental rights to her three children, KNC1, KNC2, and BKH, pursuant to MCL 712A.19b(3)(b)(ii), (c)(i), (g), and (j), and terminated D. Hect's parental rights to his child, BKH, pursuant to MCL 712A.19b(3)(b)(i), (c)(i), (g), and (j). We affirm in both appeals.

I. FACTS AND PROCEEDINGS

Respondents' children came to the attention of Children's Protective Services (CPS) in early 2014, based on a report that KNC1 sustained a hand fracture that was likely caused by deliberate abuse, and that KNC2 had a bite mark on his face. The trial court asserted jurisdiction over the children based on respondents' pleas of admission. Respondents were referred for parenting classes, individual counseling, domestic violence and anger management counseling, and relationship counseling. Petitioner's workers and service providers agreed that respondents could not safely parent their children unless they accepted accountability for their past acts of abuse. However, respondents persistently maintained that respondent Hect accidentally fractured KNC1's hand when he either stopped her fist when she tried to punch BKH or pried her hands off of BKH's neck when she tried to choke him. After the children were placed in foster care,

they disclosed additional acts of physical and sexual abuse to their foster parents, caseworkers, and KNC1's therapist. Based on the new allegations, petitioner filed a supplemental petition for termination of respondents' parental rights. After a hearing, the trial court terminated respondents' parental rights based on respondents' denials of responsibility and respondent Cope's determination to stay in a relationship with respondent Hect, despite his abuse of her children.

## II. JUDICIAL BIAS

Respondents argue that the trial court evinced bias in favor of petitioner by frequently intervening in the questioning of witnesses at the termination hearing. We disagree.

Respondents did not move for the trial court's disqualification or otherwise raise the issue of judicial bias before the trial court. Therefore, this issue is unpreserved for appellate review. MCR 2.003(D); *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2011). "The question whether judicial misconduct denied [a party] a fair trial is a question of constitutional law that this Court reviews de novo." *People v Stevens*, 498 Mich 162, 168; 869 NW2d 233 (2015). Unpreserved claims of judicial bias are reviewed for plain error affecting the party's substantial rights. *Jackson*, 292 Mich App at 597.

Respondents maintain that the trial judge displayed bias in favor of petitioner by examining witnesses with the purpose of strengthening petitioner's case and eliciting testimony on factual issues that petitioner was not pursuing. A party claiming judicial bias "must overcome a heavy presumption of judicial impartiality." *Id.* at 598 (citation and quotation marks omitted). MCR 3.923(A) provides that in child protective proceedings, if the trial court "believes that the evidence has not been fully developed, it may: (1) examine a witness, [or] (2) call a witness . . . ." "While a trial court may question witnesses to clarify testimony or elicit additional relevant information, the trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial." *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). However, as observed in *In re Forfeiture of \$1,159,420*, 194 Mich App 134, 153; 486 NW2d 326 (1992), "a trial judge has more discretion to question witnesses during a bench trial than during a jury trial . . . ." In the absence of a jury, "concern over the effect of the judge's comments and conduct [does] not exist." *Id.*

Respondents rely on *Stevens, supra*, in which our Supreme Court held that the trial judge denied the defendant a fair trial by questioning the defendant and the defense expert in a manner that signaled to the jury that the trial judge found their testimony not credible. That decision is of limited relevance to this case, in which there was no jury and which involved a child protection proceeding for which the trial court was specifically granted authority to question witnesses and even call its own witnesses.

We have reviewed respondents' many citations of instances in which the trial court intervened in the questioning of witnesses and find no support for respondents' claims of judicial bias. Instead, we conclude that the court's questioning of witnesses was proper for the full development of the evidence. Unlike a criminal case, where the prosecution's objective from the commencement of filing is to establish the charge, in child protective proceedings, with the exception of termination at the initial disposition, the goal is to determine whether the children

can be reunified with their parents. In the process of ascertaining that goal, dispositional review hearings are held where evidence is admitted regarding the children's progress in care and the parent's progress in overcoming the barriers to reunification. Reports from service providers are often admitted to the court to apprise it of such progress. At the time of termination, when the court has all the evidence previously admitted before it, it is the court's obligation to resolve any discrepancies or concerns it has in order to determine whether termination or reunification is the proper course. The trial court questioned therapist Carla Hines about KNC1's disclosures of sexual abuse to determine the trustworthiness and reliability of those statements. The court questioned family caseworker Catherine Rooney about the disclosures of sexual abuse in relation to sexual abuse being a barrier to reunification and services provided. The court intervened in the questioning of BKH's foster parent Belinda Hunter to clarify and determine the context in which BKH, just six-years-old at the time and watching an episode of SpongeBob, made a statement to Hunter regarding both physical and sexual abuse. The court intervened in Cope's questioning because it was concerned that Cope was having difficulty comprehending what was asked given that Cope had a hearing deficit and learning disability. The court questioned witnesses about respondents' use of pornography and the children's possible exposure to pornography because it reasonably considered pornography to be relevant to the allegations of sexual abuse. The court's questions to respondent Hect's mother and therapist pertained to their credibility and knowledge of the family's circumstances. Viewing the proceedings as a whole, respondents have failed to establish judicial impartiality or show that their right to a fair proceeding in accordance with the court rules was violated.

### III. SUSPENSION OF VISITATION

Respondents argue that they were denied due process because the trial court suspended parenting time before the petition to terminate parental rights was filed, and without holding an evidentiary hearing sufficient to protect their rights. They also contend that they were denied the opportunity to demonstrate that they benefitted from services and improved their parenting skills. We disagree with both contentions.

In child protective proceedings, what process is due is determined by: (1) the private interest that will be affected by the action; (2) the risk of an erroneous deprivation of the interest through the procedures used and the probable value of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that any additional or substitute procedures would entail. *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993); *In re Moss*, 301 Mich App 76, 85; 836 NW2d 182 (2013).

MCR 3.977(D) provides that "[i]f a petition to terminate parental rights to a child is filed, the court may suspend parenting time for a parent who is a subject of the petition." Suspension of parenting time is not restricted to the period following the filing of a petition to terminate parental rights, however. MCR 3.965(C)(7)(a)<sup>1</sup> and MCL 712A.13a(13)<sup>2</sup> also allow for the

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<sup>1</sup> "Unless the court suspends parenting time pursuant to MCR 712A.19b(4), or unless the child has a guardian or legal custodian, the court must permit each parent frequent parenting time with

suspension of parenting time when it would be harmful to the child. Here, the trial court heard testimony from the children's caseworker that respondents' continued failure to acknowledge that their children were abused was psychologically harmful to the children. The caseworker cited an instance where KNC1 referred to the reason for Hect's incarceration as, "because he hurt us," and Cope responded by telling her "that daddy never hurt you." The children reported additional incidents of abuse, including instances in which Hect choked KNC1, causing her to fear that he would kill her. The children also disclosed sexual abuse. The caseworker also reported that Cope attended a Family Team Meeting in October 2014, in which she denied any domestic violence in the home or in her relationship with Hect. The trial court made findings at a dispositional review hearing that parenting time should be suspended, at least until petitioner acquired more information about the abuse. Respondents were afforded an opportunity to be heard on the matter before the court suspended parenting time, and they have not established that they were entitled to more stringent procedures than the evidentiary hearing that was held before parenting time was suspended.

Respondents argue that the suspension of parenting time deprived them of the opportunity to demonstrate that they benefitted from services and that they were improving their parenting skills. Petitioner presented evidence that respondents' acknowledgment that abuse occurred, and acceptance of accountability for that abuse, were preliminary conditions for respondents to meaningfully rectify the harm they caused to the children. Respondents failed to meet these conditions. By continuing to deny that abuse occurred, respondents demonstrated that they did not meaningfully benefit from services and that they could not provide their children with the support and empathy necessary to repair the relationship.

#### IV. ADMISSION OF HEARSAY UNDER MRE 803(24)

Respondents challenge the trial court's admission of Hines's hearsay testimony, regarding KNC1's disclosures of sexual abuse, pursuant to MRE 803(24), the "catch-all" hearsay exception. The trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Preliminary questions of law, such as whether a rule of evidence precludes admissibility, are reviewed de novo. *Lukity*, 460 Mich at 488.

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a child in placement unless parenting time, even if supervised, may be harmful to the child." MCR 3.965(C)(7)(a).

<sup>2</sup> "If a juvenile is removed from his or her home, the court shall permit the juvenile's parent to have frequent parenting time with the juvenile. If parenting time, even if supervised, may be harmful to the juvenile, the court shall order the child to have a psychological evaluation or counseling, or both, to determine the appropriateness and the conditions of parenting time. The court may suspend parenting time while the psychological evaluation or counseling is conducted." MCL 712A.13a(13).

MCR 3.977(F)(1)(b) provides that when a supplemental petition to terminate parental rights is based on “one or more circumstances new or different from the offense that led the court to take jurisdiction,” the new circumstances must be proved by legally admissible evidence. The trial court did not assert jurisdiction based on sexual abuse, so petitioner was required to prove these allegations with legally admissible evidence. “Hearsay” is defined as “a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” MRE 801(d). Hearsay is generally not admissible except as provided by the rules of evidence. MRE 802. MRE 803(24) provides a “catch-all” exception, and states:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent’s intention to offer the statement and the particulars of it, including the name and address of the declarant.

Respondents contend that Hines’s testimony was not “more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts.” They argue that KNC1’s own testimony would have been more probative than Hines’s statements, but petitioner’s counsel examined her “lightly” and opted not to press her for clear answers to questions pertaining to abuse. We disagree. Throughout her testimony, KNC1 gave several answers of “maybe” or “I don’t know.” Several of her answers were non-sequiturs, especially when the questions concerned respondents. In consideration of the child’s discomfort in testifying, her difficulty in giving answers logically related to the questions, and her frequent replies of “maybe” and “I don’t know” and “I have no idea,” petitioner’s failure to elicit clear answers about sexual abuse cannot be attributed to inadequacy of effort.

Respondents challenge the trial court’s finding that KNC1 was in a dissociative state while testifying, in relation to the issue of whether Hines’s testimony was more probative on the issue of sexual abuse than KNC1’s testimony would have been, if petitioner had not “lightly” examined KNC1. It is well established that a reviewing court must defer to the special ability of the trial court to judge the credibility of witnesses. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Although dissociation in the context of respondents’ argument does not directly pertain to Hines’s or KNC1’s credibility, respondents’ argument attacks the legitimacy of the trial court’s subjective impressions of the child’s mental state. The trial court’s application of Hines’s testimony about dissociation to its observation of the child’s demeanor is a type of subjective observation very similar to evaluation of a witness’s credibility. Respondents have failed to establish that the trial court’s ruling under MRE 803(24) was invalid for this reason.

Respondents also argue that KNC1's statements to Hines in therapy lacked the requisite "circumstantial guarantees of trustworthiness" because Hines did not obtain specific information about the frequency of the incidents, and because Hines allowed KNC1 too much leeway in ending discussions when she appeared uncomfortable. In *People v Katt*, 248 Mich App 282, 295; 639 NW2d 815 (2001), aff'd 468 Mich 272 (2003), this Court set forth eight factors relevant to determining whether the totality of the circumstances provide sufficient indicia of reliability. These are: (1) the declarant's spontaneity in making the statements; (2) the consistency of the declarant's statements; (3) absence of bias or motive to fabricate; (4) the reason that the declarant is unable to testify; (5) whether the statements were made voluntarily, rather than in response to leading questions or given under undue influence; (6) the declarant's personal knowledge of the substance of the statement; (7) the person to whom the statements were made; and (8) the time frame in which the statements were made.

The trial court properly exercised its discretion in finding that KNC1's statements to Hines were sufficiently reliable. KNC1's disclosures to Hines were partly spontaneous because Hines did not direct the discussion toward sexual abuse. KNC1 did not make inconsistent statements. There was no indication that she was motivated to fabricate statements, or that she made them involuntarily. Indeed, although respondents criticize Hines's and petitioner's counsel for not asking more direct questions, their open-ended approach safeguarded against influencing the child's statements deliberately or inadvertently. Regarding the remaining factors, KNC1 spoke from her personal knowledge of her experiences, and she made the statements to a therapist she trusted. Hines was familiar with KNC1 as her therapist and had experience in the behavior of traumatized children, including the process of disassociating during discussions of traumatic experiences. Hines was able to make informed judgments about when KNC1 was disassociating, when she was speaking truthfully, and when she was frightened and in need of redirection. Respondents also argue that Hines failed to provide the dates on which disclosures were made, but Hines gave the specific relevant dates.

Respondents argue that petitioner failed to provide sufficient notice that they intended to introduce Hines's statements. MRE 803(24) requires that the proponent of the statement "make[] known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant." Although petitioner did not strictly adhere to this requirement, respondents had sufficient notice that KNC1 had disclosed sexual abuse to her therapist, and that sexual abuse would be an issue in the proceedings. The disclosures were addressed as early as the November 2014 review hearing. The trial court admitted the statements at the hearing on April 28, 2015, but allowed respondents the opportunity to present arguments for reversing the admission on the next hearing date, May 1, 2015. Under these circumstances, admission of the statements did not prejudice respondents' substantial rights. MRE 103(a).

#### V. ADMISSION OF HEARSAY UNDER MCR 3.972(C)(2)

Respondents argue that the trial court erred in admitting BKH's statement at the hearing for petitioner's supplemental petition to terminate parental rights, concerning respondent Hect's placement of duct tape over BKH's mouth, through the testimony of his foster parent Hunter, pursuant to MCR 3.972(C)(2). We disagree.

We review for an abuse of discretion the trial court's decision to admit or exclude evidence. *Lukity*, 460 Mich at 488.

Respondents argue that BKH's statement that he was duct taped by Hect lacked indicia of trustworthiness under MCR 3.972(C)(2) given its context. Respondents explained that it did not make any sense for Hect to enter a room where all the children were playing and, while laughing, duct tape BKH's mouth and then for the entire family to go to the bathroom where sexual abuse would occur only against BKH. Petitioner argues that legally admissible evidence was not required to prove the allegation that Hect abused BKH by placing tape over his mouth because physical abuse was not a new or different circumstance under MCR 3.977(F). The trial court took the matter under advisement. The court did not rule on the matter, but did mention the duct-taping incident minus any reference to the sexual abuse that followed, in its Decision and Order.

MCR 3.977(F)(1)(b) provides that facts alleged in a supplemental petition must be proven by clear and convincing evidence. The original petition requested jurisdiction and removal based on allegations of physical abuse. That petition was adjudicated as to Hect based on Hect's plea of no contest.<sup>3</sup> The supplemental petition requested termination of parental rights based on continued allegations of physical abuse and new allegations of sexual abuse, where the parents failed to acknowledge the abuse. Under MCR 3.977(F)(1)(b), only the new allegations of sexual abuse were required to be proven by clear and convincing evidence. Further, MCR 3.977(F) applies where termination is sought "on the basis of one or more *circumstances* new or different from the *offense* that led the court to take jurisdiction." (Emphasis added). The term "circumstances," as used in this court rule, conveys a broader scope than the term "offense," which denotes a specific act. Although respondent Hect's alleged conduct in taping BKH's mouth was a new and different *offense* than the incident with KNC1, it was not a new circumstance.

Even if we were to consider the duct-taping allegation a new circumstance, which again we do not, the evidence would have still been admissible under MCR 3.972(C)(2).

Under MCR 3.972(C)(2)(a),

(2) *Child's Statement*. Any statement made by a child under 10 years of age or an incapacitated individual under 18 years of age with a developmental disability as defined in MCL 330.1100a(21) regarding an act of child abuse, child neglect, sexual abuse, or sexual exploitation, as defined in MCL 722.622(f), (j), (w), or (x), performed with or on the child by another person may be admitted into evidence through the testimony of a person who heard the child make the statement as provided in this subrule.

(a) A statement describing such conduct may be admitted regardless of whether the child is available to testify or not, and is substantive evidence of the act or

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<sup>3</sup> A no-contest plea "can later be used as evidence in a proceeding to terminate parental rights if the respondent is a parent." MCR 3.971(B)(4).

omission if the court has found, in a hearing held before trial, that the circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness. This statement may be received by the court in lieu of or in addition to the child's testimony.

The failure to hold an evidentiary hearing before the termination hearing did not violate respondents' substantial rights where respondents were given notice that petitioner intended to introduce the statement, and where the court otherwise determined the statement's adequate indicia of trustworthiness through its questioning of Hunter. The court's questioning revealed that BKH made the statement spontaneously while watching cartoons and after hearing the sound of tearing tape. Respondents' argument as to the logical context of the statement in relation to the instance of sexual abuse went to assessing the weight of the statement in proving abuse, and not to a finding of whether BKH honestly reported the incident.

Affirmed.

/s/ Amy Ronayne Krause  
/s/ Kathleen Jansen  
/s/ Cynthia Diane Stephens